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# Judge and the Crime Burden

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# JUDGES AND THE CRIME BURDEN

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ONE does not happily charge the judiciary with responsibility for the country's burden of crime, but the responsibility does in fact exist. Judges, though they may not encourage crime, interfere with its prevention in various ways. They deliberately restrict police efficiency in the discovery of criminals. They exempt from punishment many criminals who are discovered and whose guilt is evident. More seriously still, they so warp and alter the public's attitude toward crime and criminals as gravely to weaken the country's most effective crime preventive.

## I

Let me elaborate, first, their interference with police efficiency and the frequency with which they refuse to punish. One might expect that rules of proper police conduct and what the police may or may not do in arresting suspected criminals or seeking evidence of their guilt would be established by legislative enactment. Some very definite rules have been so created. But, in addition, judges have themselves imposed other and far more narrowly restrictive limitations on police activity. Then, having created these limitations, they themselves undertake to assure police obedience to them. To this end they ignore the possibilities of direct action against individual officers and proceed by indirection. Judges of the federal courts and those in eighteen of the states[1] have evolved a policy of rebuking police who trans-

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1 The appendix to Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 ( 1949), lists 16 states as following the federal rule of exclusion. An analysis of state decisions appears in 35 MINN. L. REV. 457 (1951). Delaware came into the federal fold in 1950, Rickards v. Delaware, 45 Del. 573, 77 A. (2d) 199 (1950).

California repudiated its old practice and adopted the federal rule of exclusion, possibly because of the invitation of the Supreme Court in Irvine v. California, 347 U.S. 128, 74 S.Ct. 381 (1954), in 1955. People v. Cahan, (Cal. 1955), 282 P. (2d) 905. Compare People v. Mayen, 188 Cal. 237, 205 P. 435 (1922); Herrscher v. State Bar, 4 Cal. (2d) 399 at 412, 49 P. (2d) 832 (1935): "In approving use of such evidence in this case, this court

gress the limitations by reversing the conviction of criminals discovered through the transgression. Any evidence of guilt so obtained must, these courts insist, be suppressed and kept from the knowledge of trial juries. Justices of the Supreme Court, indeed, have gone farther; knowledge of fact gained through judicially forbidden police practice is not to be used for the public safety in any way.[2]

This odd procedure of exempting known criminals from punishment as a means of keeping the police in order has been discussed, applauded, or condemned by many commentators.[3] So far as I am aware, however, no one has compiled the full extent of the judge-made restrictions, which in its breadth seems more disturbing than when one or two restrictions are viewed individually.

None of the judicial decisions here discussed were forced upon the courts by extraneous authority; all are matters of judicial choice. Though in the verbiage of some judicial expression the judicial restrictions on police efficiency might appear to be the consequence of constitutional prohibitions, they are in truth judicially, not constitutionally, created. Constitutions forbid "unreasonable" searches and seizures, but they do not themselves define what is unreasonable; that is left to judicial opinion.[4] Hence

does not approve or condone the reprehensible and nefarious acts employed in the securing of such evidence, but in fact strongly condemns such tactics. In this proceeding, however, we are solely interested in determining whether the evidence, no matter how secured, indicates that Herrscher has committed acts warranting discipline."

2 Silverthorne Lumber Co. v. United States, 251 U.S. 385 at 392, 40 S.Ct. 182 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all." See also Nardone v. United States, 308 U.S. 338, 60 S.Ct. 103 (1939), where the evidence was obtained in disregard of a statutory prohibition.

But compare Walder v. United States, 347 U.S. 62, 75 S.Ct. 354 (1954), where use of the information for purposes of impeaching the defendant's credibility in another case was approved, two justices dissenting.

3 See note 78 infra.

4 "What is a reasonable search is not to be determined by any fixed formula . . . and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." Minton, J., United States v. Rabinowitz, 339 U.S. 56 at 63, 70 S.Ct. 430 (1950), citing Go-Bart Importing Co. v. United States, 282 U.S. 344 at 357, 51 S.Ct. 153 (1930).

"The constitutional expression 'unreasonable searches' is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic, and legal conditions." Milam v. United States, (4th Cir. 1924) 296 F. 629 at 631.

"The correct decision of each [case] depends not so much upon a higher critical examination of the accumulated decisional gloss as upon a common sense determination of whether, within the meaning of the word the Constitution uses, the particular search and seizure has been 'unreasonable.'" In re Ginsberg, (2d Cir. 1945) 147 F. (2d) 749 at 750.

"The test of reasonableness cannot be stated in rigid and absolute terms." Harris v. United States, 331 U.S. 145 at 150, 67 S.Ct. 1098 (1947).

judges have been able to translate their personal notions of improper conduct into plausible constitutional restrictions by the simple epithetical process of characterizing what they disapprove of as "unreasonable" and then declaring it forbidden by the Constitution.

This fact, that while the Constitution does forbid unreasonable searches it does not indicate what constitutes unreasonable search, appears to have been forgotten by some commentators. One, for example, referring to the attitudes of the various justices, said, "The reconstituted Court seems to leave Justices Frankfurter and Jackson in a clear minority *to deny encroachments* upon the Amendment. . . ."[5] The implicit suggestion that Justices Clark, Minton and the rest are inclined to approve "encroachments," by which I assume must be meant "violations" of the Constitution, is impossible of acceptance. The differences of judicial opinion can be nothing more than disagreement as to what specific searches are or are not "unreasonable," hence do or do not violate the prohibition—matters of definition, not of permitted "encroachment" on the Constitution.

Some of the judge-made restrictions have been fairly well clarified by repeated utterance, but the extent to which they do represent personal opinion is strikingly illustrated by judicial disagreement over their application. Justice Clark, referring to a similar problem of due process, expressed the situation pointedly: "The practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by police action, a conviction is overturned and a guilty man may go free."[6]

The practice of compelling obedience to judicial restrictions by concealing truth from juries was likewise evolved by the judges themselves. Even though a search be unquestionably "unreasonable" and therefore prohibited by the Constitution, nothing in the Constitution says what the consequence shall be. Just as the matter of what constitutes "unreasonable" search is left to judicial decision, so the consequence of such search when it does occur is likewise left to judicial decision, in the absence of legislative enactment. Justice Black has said, "The federal exclusionary rule is not a command of the Fourth Amendment but is a judicially

5 Reynard, "Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?" 25 IND. L.J. 259 (1950) (italics added). As to various judicial attitudes the article is worth reading.

6 Irvine v. California, 347 U.S. 128 at 138, 74 S.Ct. 381 (1954).

created rule of evidence. . . ."[7] The soundness of the position that suppression of evidence is not required by the Constitution is confirmed by the number of state courts which do not exclude the evidence despite the similarity of the state and federal constitutions.[8]

Although the constitutional provisions are broad enough in their phrasing to cover searches by any person whosoever, the Supreme Court has declined to apply its exclusionary rule to obviously unlawful—and in that sense unreasonable—search by private persons.[9]

[7] Wolf v. Colorado, 338 U.S. 25 at 33, 69 S.Ct. 1359 (1949), adding, "we hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." So also United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950).

See also, Waite, "Police Regulation by Rules of Evidence," 42 MICH. L. REV. 679 (1944).

[8] E.g., Commonwealth v. Wilkins, 243 Mass. 356 at 361, 138 N.E. 11 (1923): "Those [federal] decisions are not binding on this court in interpreting similar provisions of the Constitution of this Commonwealth." State v. Pluth, 157 Minn. 145 at 153, 195 N.W. 789 (1923): ". . . the decisions of the Federal Supreme Court construing [the Fourth Amendment] are not binding on the state courts when construing similar provisions in state constitutions." People v. Defore, 242 N.Y. 13 at 24, 150 N.E. 585 (1926): "We may not subject society to these dangers until the legislature has spoken with a clearer voice."

See also Ex parte Mobile, 251 Ala. 539, 38 S. (2d) 330 (1949) and State v. Tonn, 195 Iowa 94, 191 N.W. 530 (1923), rejecting previous acceptance of the federal rule.

Some state decisions, however, do speak of the exclusion as though forced on them by their constitutions, e.g., Orick v. State, 140 Miss. 184, 105 S. 465 (1925); People v. Stein, 265 Mich. 610, 251 N.W. 788 (1933). Others seem to base inadmissibility of the evidence on the prohibition of compulsory self-incrimination, e.g., People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923); Gore v. State, 24 Okla. Crim. 394, 218 P. 545 (1923).

Exclusion has been occasionally made a statutory rule. North Carolina session laws 1951, c. 644, discussed 30 N.C.L. REV. 421 (1952).

In On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952), anti-narcotic agents had used a microphone concealed on what the defendant's counsel called a stool pigeon to transmit to a listening agent statements by the accused concerning his selling of opium. Here Justice Frankfurter voices (at p. 761) a not uncommon "justification" of the exclusion—not that the Constitution requires it, but that "my deepest feeling against giving legal sanction to such 'dirty business' as the record in this case discloses is that it makes for lazy and not alert law enforcement." The justice does not suggest by what cleaner method the evidence against narcotics peddlers could be obtained.

So also in McDonald v. United States, 335 U.S. 451 at 457, 69 S.Ct. 191 (1948), Justice Jackson seems to agree with Vinson, Burton and Reed that spying into a room through a transom was not technically a "search," although he does loosely speak of it as such, but disapproves use of the evidence because the manner of obtaining it showed "a shocking lack of all sense of proportion."

[9] "The Fourth Amendment's origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . ." Burdeau v. McDowell, 256 U.S. 465 at 475, 41 S.Ct. 574 (1921). Query: if Congress should attempt to protect "private" searchers from tort liability, would the Court hold the enactment constitutional?

This limitation in the suppression of evidence to evidence obtained by *police* action led to a jolly little Prohibition game wherein state officers having evidence unusable in the state courts turned it over to federal police for use in federal courts—the state officers being mere private persons under the Burdeau v. McDowell notion. United States v. Diuguid, (2d Cir. 1945) 146 F. (2d) 848: "The Fourth Amendment does not reach the

Contrary to popular belief, also, the issuance of a warrant for search or arrest is not required by constitutional provision as an essential of reasonableness. On the contrary, both searches and seizures without pretense of a warrant have consistently been recognized as reasonable and proper.[10]

With this explanatory background of the decisions it should be interesting to consider what sort of police activities have sufficiently revolted enough judges to call for rebuke by judicial suppression of evidence discovered thereby.

### *Searches of Houses*

One landmark case is *Agnello v. United States.*[11] Here government agents had seen Agnello bring cocaine from his house and deliver it to a purchaser. They arrested him, then went at once to his room and searched it. Because the can of cocaine they found there was used in evidence his conviction was reversed. The defense counsel set up a puzzling contention that the search must be considered "unreasonable" because a search warrant would not have been issued had it been asked for—a proposition which, were it accepted, would mean that search without a warrant was unreasonable, no warrant could be lawfully issued, hence lawful search for Agnello's dangerous hoard would be legally impossible. The Court did not expressly pass judgment on that position. Neither did it refer to the fact that had the agents delayed to get

misconduct of individual state officers." See also Grice v. United States, (4th Cir. 1945) 146 F. (2d) 849; Miller v. United States, (3d Cir. 1931) 50 F. (2d) 505; "Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities," 51 COL. L. REV. 128 (1951). State v. Rebasti, 306 Mo. 336 at 347, 267 S.W. 858 (1924): "The restrictions of the Fourth and Fifth Amendments of the Federal Constitution apply only to Federal officers. The like restrictions in the State Constitution apply only to State officers." Evidence obtained by a state officer through unreasonable search can be used in a federal prosecution, and vice versa.

The game was slightly blocked by Gambino v. United States, 275 U.S. 310, 48 S.Ct. 137 (1927).

10 Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1924), noted 24 MICH. L. REV. 277 (1925). McBride v. United States, (5th Cir. 1922) 284 F. 416; State v. Lindsey, 192 Wash. 356, 73 P. (2d) 738 (1937).

"There is no guaranty [in the Constitution] against searching and seizing, nor against searching without a warrant. The question as to whether a search is unreasonable does not depend altogether on whether a warrant was held by the officer." United States v. McBride, (D.C. Ala. 1922) 287 F. 214 at 216, affd. McBride v. United States, (5th Cir. 1922) 284 F. 416.

People v. Case, 200 Mich. 379, 190 N.W. 289; Milam v. United States, (4th Cir. 1924) 296 F. 629 (1924); Lambert v. United States, (9th Cir. 1922) 282 F. 413.

"The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances." Trupiano v. United States, 334 U.S. 699 at 705, 68 S.Ct. 1229 (1948).

11 269 U.S. 20 at 32, 46 S.Ct. 4 (1925).

a warrant —if one could have been procured—the evidence might have disappeared as soon as news of the arrest reached the grapevine, and Agnello's conviction would therefore have been impossible. It merely laid down a flat proposition that, "The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws."[12]

The absoluteness of this rule against search of a house without a warrant is evidenced by a later state decision.[13] Following an anonymous tip, an officer for two days watched a suspected lottery ticket house. Each day "he saw, between the hours of nine and eleven o'clock, fifteen or more colored persons, men and women, enter the house and thereafter leave, carrying papers in their hands." On the third day, some person who entered left the door open. The officer followed him in and found Gorman seated at a table on which were lottery tickets and money which he was putting into envelopes as other men watched. The court held that because the officer's entry had been without a warrant it was unreasonable, and the resultant conviction was reversed.[14]

However, although the Court postulated that flat dictum in the *Agnello* case, it made one concession, to the effect that even without a warrant search within a house might be reasonable "as incident to a lawful arrest therein." But even this limited excep-

[12] This, however, was not the first decision to preclude use of evidence obtained by search of a house; it was preceded by Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914). The Court in the Agnello case predicated this conclusion not upon reasoned evaluation of consequences, but upon assertion that the unreasonableness "has always been assumed," and "Congress has never passed an act purporting to authorize search of a house without a warrant."

The horns of this police dilemma of searching promptly, or risking loss of evidence by delaying for a warrant, were sharpened by a later Washington state court decision which held a search without a warrant to be unreasonable while at the same time acknowledging that a valid warrant could not have been issued. Army officers had complained to the Tacoma police that soldiers were contracting venereal disease in a reputed place of prostitution. After watching men in uniform go into the house through an alley singly or in pairs and leave soon after, the police entered and found conclusive evidence of prostitution. The state supreme court reversed conviction on the strength of a statute making it "unlawful for any policemen or other police officer to enter and search any private dwelling house or place of residence without the authority of a search warrant." The court recognized that "There is no statute in this state authorizing the issuance of a search warrant for premises suspected of being used as a house of prostitution or against the person suspected of operating such a house." Nevertheless, it held that evidence obtained through the search should have been excluded. Tacoma v. Houston, 27 Wash. (2d) 215 at 219 and 220, 177 P. (2d) 886 (1947). See also Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946).

[13] Gorman v. State, 161 Md. 700, 158 A. 903 (1931).

[14] In State v. Andrews, 91 W.Va. 720, 114 S.E. 257 (1922), an officer had been sent to Andrew's house to investigate a report that he had assaulted his wife who had been seen with blood on her face and making outcry. Finding the house apparently unoccupied and the door open the officer entered and saw unlawful whiskey in an open closet. The entry was held unreasonable.

tion has provoked controversy. As late as 1948 it was made virtually meaningless by *Trupiano v. United States.* Federal agents were in a position to see the actual manufacture of unlawful alcohol through the open door of a rough sort of barn. They entered and placed the operator under arrest. Then they seized mash and alcohol which was later used in evidence. It was clearly a search and seizure *after* an arrest within the building. Nevertheless the Supreme Court by a 5-to-4 decision held the seizure *unreasonable* and reversed the conviction. Justice Murphy said:

> "Reliance is here placed on the long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence. We sustain the Government's contention that the arrest of Antoniole was valid. . . . The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. . . . But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . The proximity of the contraband property to the person of Antoniole was a fortuitous circumstance which was inadequate to legalize the seizure. . . . In other words, the presence or absence of an arrestee at the exact time and place of a foreseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us."[15]

Even the dissenting justices seem to have agreed that had Antoniole happened to see the officers in time to run outside the shed before they could catch and arrest him they could not have seized the evidence, which was visible just inside the open door, until time enough had elapsed for them to locate a magistrate and return with a warrant.

This latter proposition, that arrest outside will not validate search inside, still stands, but a change in the Court's personnel later produced a 5-to-3 declaration that when an arrest has been made within the house "a rule of thumb requiring that a search warrant always be procured whenever practicable may be appeal-

[15] Trupiano v. United States, 334 U.S. 699 at 704-708, 68 S.Ct. 1229 (1948).

ing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search."[16]

As the judge-made rule now stands, therefore, *if, but only if,* a valid arrest is made within a house some degree of search is permissible without absolute necessity for a warrant.

### *Extent of Search*

So far as the search is judicially permitted at all, its extent is rigorously limited. In a Michigan case[17] the sheriff with a warrant for Conway's arrest had entered the house and taken him into custody on the ground floor. A deputy sheriff found evidence of Conway's guilt in a cache under a removable piece of flooring at the head of the stairs. This evidence the state supreme court held should not have been used. It recognized that under prior decisions "the police have the power . . . to search the room or the place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested."[18] But the court added: "He [the sheriff] and his officers did not gain lawful access to that part of the house where the white mule was kept. There they were trespassers." The conviction was reversed for that reason.

Where the limit is to be drawn, like the other factors of "reasonableness," depends not on rule but upon the judges. In *Rabinowitz v. United States,*[19] only the one-room office, open to the public, in which the arrest occurred was searched. Of that search the majority opinion says: "In all the years of our Nation's existence, with special attention to the Prohibition Era, it seems never to have been questioned seriously that a limited search such as here conducted as incident to a lawful arrest was a reasonable search and therefore valid." The dissent stood on the ground, not that here was search beyond the territorial limits permissible, but rather upon the holding in the *Trupiano* case that no search at all should have been made even after the arrest. However, in *Harris v. United States*[20] the judicial disagreement seems to have turned on both territorial extent of the search and upon its intensity.

16 United States v. Rabinowitz, 339 U.S. 56 at 65, 70 S.Ct. 430 (1950).

17 People v. Conway, 225 Mich. 152, 195 N.W. 679 (1923).

18 Quoted by the court from Smith v. Jerome, 47 Misc. 22, 93 N.Y.S. 202 (1905) and People v. Cona, 180 Mich. 641 at 662, 147 N.W. 525 (1914).

19 339 U.S. 56 at 63, 70 S.Ct. 430 (1950).

20 331 U.S. 145, 67 S.Ct. 1098 (1947).

In the *Harris* case, warrants had been issued for the arrest of Harris on a charge of using the mails in pursuance of a scheme to defraud the Nudge Oil Company. Federal Bureau of Investigation agents went to his apartment where they arrested him by virtue of these warrants within the living room. In an effort to find $10,000 in cancelled checks believed to have been stolen from the Nudge Company and used in perpetrating the fraud, these agents searched the living room, bedroom, kitchen and bath for several hours—lifting carpets, turning over the mattress, combing the linen closet, opening drawers, looking into shoes. As Justice Frankfurter put it, ". . . if there was no 'rummaging of the place' in this case it would be difficult to imagine what 'rummaging of the place' means." The agents explained that their search was for the purpose of locating any means that might have been used in commission of the crime, "such as burglar tools, pens, or anything that could be used in a confidence game of this type." Various instruments such as pens and tissue paper which could have been used as instruments of forgery and strips of celluloid capable of being used in picking locks were discovered. The checks were not found, but in a sealed envelope in a drawer the agents discovered evidence of Harris' participation in draft evasion frauds. He was brought to trial on this latter charge and the evidence so discovered was admitted over his objection. It was contended that this evidence had been obtained by unreasonable search and should have been suppressed.

The majority held the search reasonable despite its five-hour intensiveness. Of its territorial extent the opinion says: "The area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment." As to its intensiveness: "It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot. . . . We do not believe that the search in this case went beyond that which the situation reasonably demanded." But Justices Frankfurter, Murphy, Rutledge and Jackson were of a different opinion to the extent of forty-two pages.

The fact that search within a house is made by stealth rather than force, or by entry as a "caller" without any breaking, does not negative unreasonableness.[21] Nor is search made reasonable by

21 Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261 (1921). See also, comment, 3 BUFFALO L. REV. 283 at 285 (1954).

consent of the suspect's wife to the entry;[22] nor by the fact that there was no one in the house and the officer entered through an open door.[23]

This judicial permission for a limited amount of search within a house has been carefully confined to searches following arrest within the house itself. "The search must be made at the place of the arrest, otherwise it is not incident to the arrest. . . . A search is not incident to the arrest, unless the search is made at the place of the arrest, contemporaneously with the arrest."[24]

At the moment, then, it appears that, regardless of any possibility that pertinent evidence may disappear, the police are forbidden by judicial rule to search within a house without a warrant, even though a warrant cannot be obtained, unless the search follows upon a lawful arrest within the house, and that the extent of this permitted exception depends upon the particular judges' notions of propriety rather than on rule.

### *Search by Virtue of a Warrant*

In the *Harris* case Justice Frankfurter paraphrased the majority opinion: "Since the search was lawful, anything illicit discovered in the course of the search was lawfully seized."[25] To this he replied:

> "But even if the search was reasonable, it does not follow that the seizure [of the draft evasion evidence] was lawful. If the agents had obtained a warrant to look for the cancelled checks, they would not be entitled to seize other items discovered in the process. . . .[26] The court's decision achieves the novel and startling result of making the scope of search without warrant broader than an authorized search."

22 Amos v. United States, 255 U.S. 313, 41 S.Ct. 266 (1921).

23 State v. Andrews, 91 W.Va. 720, 114 S.E. 257 (1922); Gorman v. State, 161 Md. 700, 158 A. 903 (1931).

24 Papani v. United States, (9th Cir. 1936) 84 F. (2d) 160. Here the driver of a car was arrested some miles from the house, and "the search [of the house] was not made at the place of arrest." Poulos v. United States, (6th Cir. 1925) 8 F. (2d) 120 (arrest just outside house did not justify search within it). But arrest of a suspect some 20 feet from his house as he was fleeing from it to avoid arrest was held to justify immediate search of the house, Patton v. State, 43 Okla. Crim. 436, 279 P. 694 (1929). But the court distinguished the situation from Wallace v. State, 42 Okla. Crim. 143, 275 P. 354 (1929), where arrest on the street was held not to justify entry of the house, by the fact that here the accused was fleeing from what would immediately have been an arrest within.

In State v. McClendon, 64 S.D. 320, 266 N.W. 672 (1936), the defendant's room was searched and burglar's tools found therein 30 minutes after an arrest within the house; evidence held not admissible.

25 331 U.S. 145 at 163 and 164, 67 S.Ct. 1098 (1947).

26 Id. at 164, citing Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927).

A Michigan decision says flatly: "Except as he followed the strict mandate of his warrant to search for and seize if found a described quantity of beans the officer was a trespasser upon those premises." Conviction was reversed because the officer had not shut his eyes to evidence of other criminality.[27] The Supreme Court has ruled that a warrant to search for what is wanted only because it is evidence of crime cannot lawfully be issued.[28]

*Search of Other Structures*

The judicial limitation on search without a warrant has not been confined to houses. Anne Johnson had only a hotel room. Word had come to detective lieutenant Belland that someone was smoking opium in Seattle's Hotel Europe. He and an anti-narcotics agent went to the hotel where their experienced noses led to a room from which came an unmistakable odor. Belland knocked and told who he was. After some delay and the sound of hurried movement Anne Johnson, alone in the room, opened the door. She flatly denied that there was any odor or any opium. Belland could have gone for a warrant, and when he returned with it there truly would have been no odor or opium. Instead he put Anne under arrest and searched at once. Under the bed clothes he found opium and a pipe still warm from use. The Supreme Court, in a 5-to-4 decision, held the search "unreasonable."[29]

[27] People v. Preuss, 225 Mich. 115 at 120, 195 N.W. 684 (1923). "Federal narcotic officer, on detecting odor of burning opium coming from defendant's home was authorized to search premises for violation of Harrison Anti-Narcotic Act only, and not for violation of National Prohibition Act." United States v. Boyd, (D.C. Wash. 1924) 1 F. (2d) 1019.

In State v. Richards, 334 Mo. 485 at 494, 67 S.W. (2d) 58 (1933), it was thought that the suspect, charged with robbery and murder, might have taken a 38-caliber revolver. A warrant to search for it was issued. A 32-caliber revolver was found and eventually offered in evidence. There was reason why it should have been excluded because legally irrelevant, but the court put exclusion on the ground also that "the search warrant described a certain revolver as the stolen property to be seized under the warrant. Such a search warrant did not authorize the officer to seize property not contraband, and therefore, the search and seizure of the property [the 32-caliber revolver] in question was not authorized." See also State v. Wright, 336 Mo. 135, 77 S.W. (2d) 459 (1934). Tennessee judges held it unreasonable to make a second search under a warrant an hour after the first search had revealed nothing. McDonald v. State, 195 Tenn. 282, 259 S.W. (2d) 524 (1953), noted 5 HASTINGS L.J. 89 (1953).

In People v. Berger, (Cal. 1955) 282 P. (2d) 509 (1955), conviction of one who had collected money for charity and kept it for himself was reversed because the warrant did not specify the area to be searched or the thing to be seized.

[28] Gouled v. United States, 225 U.S. 298, 41 S.Ct. 261 (1921). See also Piedmont v. State, 198 Ind. 511, 154 N.E. 282 (1926); State v. Wright, 336 Mo. 135, 77 S.W. (2d) 459 (1934).

[29] Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948).

Trupiano occupied only "a roughly constructed barn" which he had erected as a shed in which to manufacture untaxed alcohol. His conviction was reversed because federal agents, who had seen through the open door what was going on, had entered and seized the evidence without a warrant.[30]

Indeed these restrictions upon reasonableness of search have not been confined to searches of houses or other buildings. Courts have reversed, for instance, because the police dug into a garden from which they had seen the suspect dig out liquor,[31] because they searched a sort of dug-out cave with a hole in the roof for escape of smoke,[32] and a garage unattached to the house.[33]

*Search of Person*

Search of the person is likewise drastically limited by judicial decision. It is consistently permitted following a lawful arrest,[34] but is forbidden after an unlawful one. Arrest and search of a wholly innocent person may be lawful if made on reasonable ground to believe him guilty of a felony. But arrest of a guilty felon, who deserves arrest as a matter of public safety, is held unlawful if reasonable ground for belief is absent.[35] Hence any proof of guilt found after such an arrest must be suppressed despite its showing that the suspect was in fact a criminal who ought to have been arrested.

Partly for this reason Judith Coplon went unpunished for her attempt to deliver "defense information" to an agent of the Soviets. Federal agents with strong reason to suspect her activities had trailed her to meetings with her Russian confederate, Gubi-

30 Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229 (1948).

31 Childers v. Commonwealth, 198 Ky. 848, 250 S.W. 106 (1923).

32 Morse v. Commonwealth, 204 Ky. 672, 265 S.W. 37 (1924).

33 United States v. Slusser, (D.C. Ohio 1921) 270 F. 818.

The prohibition was held not to extend to a "woodland remote from the dwelling," Brent v. Commonwealth, 194 Ky. 504, 240 S.W. 45 (1922); nor to open fields, Rogers v. State, 28 Okla. Crim. 195, 230 P. 279 (1924); Hester v. United States, 265 U.S. 57, 44 S.Ct. 445 (1924). See also McClannan v. Chaplain, 136 Va. 1, 116 S.E. 495 (1923). But cf. Allison v. State, 189 Tenn. 67, 222 S.W. (2d) 366 (1949), where conviction was reversed because officers had investigated a "wood lot" half a mile from the home.

34 "The rule appears established in this State that search and seizure is not unreasonable if accomplished without a warrant but as an incident to lawful arrest." Italiano v. State, 141 Fla. 249 at 251, 193 S. 48 (1940), cert. den. 310 U.S. 640, 60 S.Ct. 1088 (1940). So also United States v. Pisano, (7th Cir. 1951) 193 F. (2d) 361; People v. Exum, 382 Ill. 204, 47 N.E. (2d) 56 (1943); People v. Euctice, 371 Ill. 159, 20 N.E. (2d) 83 (1939).

35 People v. Ford, 356 Ill. 572, 191 N.E. 315 (1934); People v. Ward, 226 Mich. 45, 196 N.W. 971 (1924). Here again the declaration that the arrest of the guilty person is "unlawful" is an uncompelled judicial choice of decision, which sometimes blandly ignores legislation explicitly making it lawful. See Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933).

tchev. "On all three occasions the two had wandered aimlessly about, meeting, separating, rejoining, going hither and yon, continually looking back, and in general giving every indication of persons who thought they might be shadowed and wished to escape being trailed." At two of the meetings the agents could see no papers passed to Gubitchev although at one time he reached in front of her body and might have got something from her purse. At the third meeting both appeared to be acting with even more circumspection. The agents arrested them. In her purse they found "many incriminating documents, which she almost certainly would not have been carrying to such an interview were she not intending to pass them to Gubitchev."[36]

> "In other words, Judith Coplon was participating in the commission of a felony in the presence of the F.B.I. agent when he took her into custody. The question is, was the F.B.I. agent powerless to arrest without warrant for a felony which he observed being committed, although a private person in similar circumstances could have done so?"[37]

The judges of the Second Circuit answered this in the affirmative; the officer does lack power to arrest. Federal law, they said, authorizes such an agent to arrest without warrant "only when there is likelihood of [the suspect] escaping before a warrant can be obtained for his arrest." In this case they said, "Although the judge found that the agent who made the arrest had reason to believe that Judith Coplon was likely to escape, we can see no basis for the finding." Thus they found that the arrest of the concededly guilty Coplon was "invalid" and the evidence found on her person should have been suppressed.[38]

[36] United States v. Coplon, (2d Cir. 1950) 185 F. (2d) 629 at 632.

[37] Quoted from Coplon v. United States, (D.C. Cir. 1951) 191 F. (2d) 749 at 752.

[38] United States v. Coplon, (2d Cir. 1950) 185 F. (2d) 629 at 634 and 635. In the successor case, on a different indictment, the District of Columbia court said flatly, "We cannot suppose that Congress intended . . . to make a Bureau agent powerless to act when a felony is committed before his eyes. . . . Our conclusion is that the arrest of Judith Coplon on March 4, 1949 was lawful." It also reversed conviction, however, because some of the evidence used had been obtained by wiretapping. Coplon v. United States, (D.C. Cir. 1950) 191 F. (2d) 749 at 754. Certiorari was denied in each case and Coplon has escaped conviction.

The unwillingness of the appellate judges in the Second Circuit to accept the judgment of the trial judge as to necessity for prompt arrest exemplifies a fairly characteristic distrust by judges of their colleagues' capacity for sound conclusions of fact. During the trial of Elmer Remmer for income tax evasion, one of the jurors was told casually that "Remmer had a lot of money." On appeal from conviction, the Supreme Court referred the matter to the district court for a new trial if investigation showed that the incident had been prejudicial. Judge Goodman of the district court concluded that it had been harmless. Nevertheless, Justice Black "would reverse the judgment of conviction and

This rule, that "unreasonable" arrest of one who for the public safety ought to have been arrested precludes his conviction by evidence thereby discovered, puts the police in an awkward situation at times. Michigan's statutes make the carrying of concealed weapons a felony. After Detroit had suffered a plague of 1367 armed hold-ups in a year the police commissioner ordered his men to arrest every unlawful gun-carrier they could find before he tried to use his gun. But guns which are not concealed are not unlawful; those which are unlawfully carried are not visible. I had opportunity to study the results of this attempt to check gun carrying and found that one fourth of all the *guilty* gun-toters arrested went unconvicted because judges would not permit the truth of their guilt to be shown.[39]

### *What Constitutes Search*

Whether a search is or is not judicially to be stigmatized as "unreasonable" is one basis of controversy. Whether a particular action by which evidence is obtained constitutes technically a "search" is a different question. In *McDonald v. United States*[40] it appears that police officers having some reason to believe that McDonald's room in a rooming house was headquarters of a "numbers game" lottery, climbed through a window into the landlady's room whence they entered the hall, and one of them by standing on a chair looked through the transom of McDonald's room. On the strength of what the officer saw McDonald was at once arrested, and the evidence seen by the officer was used. The majority of the Court, in three separate opinions, held the proceeding to be a search, and unreasonable. Justices Vinson, Burton and Reed dissented on the ground that, "There was no search. There is, therefore, no issue as to the need for a search warrant."[41]

grant a new trial in view of the jury incident." The public's frequently voiced distrust of the judicial capacity for sound conclusions is perhaps explicable.

[39] See Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933). See also Kraemer v. State, (Fla. 1952) 60 S. (2d) 615.

The people of Michigan showed disapproval of this judicial action by amending their constitution to authorize evidence as to concealed weapons, and later as to narcotic drugs, despite its discovery through unlawful arrest. Art. II, sec. 10, as amended 1936, 1952.

[40] 335 U.S. 451, 69 S.Ct. 191 (1948).

[41] Id. at 461. Justice Jackson would have approved use of the evidence had the officers been in the hallway itself without trespass. It is not clear from his opinion whether had that been the case he would have said that what later transpired was a search but was not unreasonable, or that because of the lawful entry to the hallway there was no search of McDonald's room. His rather loose expression seems to indicate the latter.

*Restrictions Unrelated to Search*

Various other restrictions on police efficiency have been urged or actually imposed by judges independently of the search and seizure provision. In *Olmstead v. United States*[42] a majority of the Court sustained admission of evidence procured by wiretapping on the ground that because no trespass on the defendant's property had occurred it was not a "search." But Justices Brandeis and Holmes would have excluded it on the broad ground that it was "unethically" obtained. Subsequently the Court gave effect to its disapproval of such methods by its interpretation of the legislation forbidding revelation of information acquired by wiretapping. As a matter of precedent the Court could have read into the statute an implicit exception of revelation in court by judicial order.[43] It chose, however, to interpret the prohibition adversely to maximum police effectiveness.[44]

In one decision Justice Murphy, dissenting, voiced a belief that: "Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a dictaphone that transmits to the outside listeners the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the government and intimate personal matters are laid bare to view."[45]

In *Irvine v. California*[46] four justices vigorously protested that persons should be permitted to carry on in crime if they chose without risk of discovery through a microphone concealed in the

[42] 277 U.S. 438, 48 S.Ct. 564 (1928).

[43] See State v. Gorman, 110 Wash. 330, 188 P. 457 (1920); Church of Holy Trinity v. United States, 143 U.S. 457 at 459, 12 S.Ct. 511 (1892): "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

[44] Weiss v. United States, 308 U.S. 321, 60 S.Ct. 269 (1939); Nardone v. United States (2d case), 308 U.S. 338, 60 S.Ct. 266 (1939); Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942).

[45] Goldman v. United States, 316 U.S. 129 at 139, 62 S.Ct. 993 (1942). The clear implication is that even criminals should be permitted to carry on their nefarious activities in undisturbed privacy. Justice Brandeis, despite his objection to acquisition of evidence by "unethical" methods, might have disagreed with Justice Murphy as to use of devices which penetrate distance. "The testimony of the boatswain shows that he used a searchlight. . . . Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Brandeis, J., in United States v. Lee, 274 U.S. 559 at 561, 47 S.Ct. 746 (1927).

It is of interest to note that during President Eisenhower's stay in the hospital, newsmen took pictures of him with telescopic cameras. If such an invasion of the presidential privacy is legitimate, as it appears to be, one may wonder why Justice Murphy should have called similar invasion of a criminal's privacy unreasonable.

[46] 347 U.S. 128, 74 S.Ct. 381 (1954).

house. Again in *On Lee v. United States*[47] four justices considered it "dirty business" rather than effective crime prevention for an employee of the Bureau of Narcotics to talk with an opium purveyor in his laundry while wearing a microphone through which anti-narcotics officers could hear what was said. Turning the beam of a flashlight into an automobile while the officer was examining the license of a driver who had violated the traffic law was held so unreasonable as to preclude use of what was revealed by the light.[48]

In another decision proof of guilt was excluded for a rather unusual reason. The court thought it "beside the point to consider whether the officers had probable cause to search the appellee's car without a warrant. It is conceivable that they did." But it approved suppression of the evidence found by the search because the judges felt that the police had been unreasonable in stopping the suspect's fleeing car by shooting at its tires.[49]

One further judicial suppression of truth calls for brief notation. Federal legislation like that of the states directs that every person arrested must be taken immediately before a magistrate. Sometimes there are definite advantages to really effective enforcement through momentary disregard of this immediacy. At the hearing before the magistrate the police must be prepared to make a case technically sufficient for holding the suspect for further proceedings. Not infrequently the stress of circumstances necessitates prompt taking of a man into custody before the police can gather the witnesses required for such a showing. In such cases presentation before a magistrate is sometimes not precisely prompt. In other cases delay has resulted from the mere neglect of careless officials. For such delays the detained person has a definite right of action.[50]

The Supreme Court, however, has of its own initiative sought to persuade the police from such delays by suppressing evidence obtained during such a delay. Revenue officers had raided an unlawful still; while they were on the premises, one was killed, another wounded by unseen gunmen. The brothers McNabb were

[47] 343 U.S. 743, 72 S.Ct. 967 (1952).

[48] One Ford Tudor Auto v. State, 207 Okla. 148, 248 P. (2d) 593 (1952).

[49] United States v. Costner, (6th Cir. 1946) 153 F. (2d) 23 at 26.

Using a stomach pump was held a violation of due process rather than unreasonable search. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952), discussed in 50 MICH. L. REV. 1367 (1952).

[50] Green v. Kennedy, 46 Barb. (N.Y.) 16 (1866); Pastor v. Regan, 9 Misc. 547, 30 N.Y.S. 657 (1894); Leger v. Warren, 62 Ohio St. 500, 57 N.E. 506 (1900).

arrested for the killing and taken first to the local federal building, then to jail. The statute provides that persons arrested must be taken "immediately" before a magistrate. The McNabbs were held from 2 o'clock Thursday afternoon until sometime Saturday before being brought before a magistrate. During that period they confessed to the killing. Had this confession been in any way "compelled" it would of course have been unusable in evidence as compelled self-incrimination. Conviction of the McNabbs was reversed because the confessions were used in evidence, but the Court, though its opinion is singularly vague and indefinite, carefully refrained from any suggestion that the confessions were the product of either direct or indirect compulsion. Rather, the Court suppressed the truth as a rebuke to the officers for their failure to take the suspects more promptly before a magistrate.[51] The immediate consequence of this decision was failure of a number of other apparently deserved convictions.[52]

This decision was followed by *Upshaw v. United States*[53] which left no possible doubt that reversal was decided on solely and simply as a rebuke to the police. "The McNabb confessions were thus held inadmissible because the McNabbs were questioned while held 'in plain disregard of the duty enjoined by Congress upon federal officers' promptly to take them before a judicial officer."[54]

[51] McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943). Justice Reed dissented (at p. 349) on the ground that, "If these confessions are otherwise voluntary, civilized standards, in my opinion, are not advanced by setting aside these judgments because of acts of omission which are not shown to have tended toward coercing the admissions." The decision is commented on by the author in 42 MICH. L. REV. 679 (1944). A somewhat different discussion is in 53 YALE L.J. 758 (1944). In the McNabb case the defendants did not escape punishment entirely; following a second trial and conviction of voluntary manslaughter each was sentenced, July 28, 1943, to imprisonment for 9 years, 3 months. In a later opinion, Upshaw v. United States, 335 U.S. 410, 69 S.Ct. 170 (1948), Justice Reed (at p. 418) spoke of the McNabb decision as having been made "without the benefit of brief or argument."

A proposal that the Advisory Committee on Federal Rules of Criminal Procedure should embody the purport of this decision in its proposed rules met with vigorous criticism from both bench and bar and was rejected. Mr. J. Edgar Hoover, Director of the F.B.I., condemned it strongly. See 42 MICH. L. REV. 679 at 689 (1944).

[52] 42 MICH. L. REV. 909 (1944), citing hearings before the Judiciary Committee of the House, H. Hearings on H.R. 3690, 78th Cong., 1st sess., No. 12, p. 46 (1943). The McNabb decision was "condemned by the House of Representatives and not acted upon by the Senate." 335 U.S. 410 at 434, 69 S.Ct. 170 (1948).

[53] 335 U.S. 410, 69 S.Ct. 170 (1948).

[54] Id. at 413. "Our holding is not placed on constitutional grounds. Since the *McNabb* rule bars admission of confessions we need not and do not consider whether their admission was a violation of any of the provisions of the Fifth Amendment." Id. at 414, footnote.

This opens an interesting speculation as to whether the court will extend its indirection of control to another type of police disregard of statutes. The procedure of extradi-

So stand the judge-made restrictions on police efficiency and the judicial indirection of trying to make them effective. The evils are apparent. The conventional theory of crime prevention is deterrence through fear—to scare the Devil out of his potential disciples by demonstration of what happens to disciples who are caught. It may be an unsound theory. Men seem seldom to have been deterred from their desires by danger. They travelled the Santa Fe trail with laughter at Comanche tortures. They climbed the Chilkoot for Yukon gold over the frozen bodies of their predecessors. They drive automobiles on the wrong side of curves. But to scare the Devil is the accepted theory and insofar as there is deterrence in the threat of punishment for crime the effectiveness of that deterrence will increase or diminish with the probability or improbability of punishment. Hence it follows ineluctably that *by every unnecessary limitation the judges place on police efficiency, and by every discovered criminal they protect from deserved punishment, those judges are derogating from the force of deterrence and contributing to the country's already too heavy and increasing burden of crime.*

II

If deterrence through fear were the only operating preventive of crime, or were itself the most effective preventive, discussion might well stop here. Judicial contribution to the crime burden is already clear. But the ill consequence of judicial decision goes farther.

In every normal human being there functions a strongly compulsive tendency to conform his conduct with the ideals of the group of people to which he belongs. The tendency varies in its cogency, of course. It must operate differently upon an individual holding fast to some desirable position in a close-knit association and upon one who is already outcast and perhaps beyond even

tion from one state to another is precisely specified by statute. Driven to desperation by the interminable delays sometimes intervening the police have been known to bring a fugitive back for trial by force, or trickery, in utter disregard of the technical provisions. Here the legal remedies, though available, are not more practicable than those for unlawful detention after arrest. But so far the courts have not undertaken to rebuke the police by refusing to take jurisdiction over the available defendant. Dean v. Ohio, (D.C. W.Va. 1952) 107 F. Supp. 937 at 939: "It is virtually a universal rule that where an accused is found in a jurisdiction wherein he is charged with a crime, the circumstances surrounding his actual presence within the jurisdiction will not be inquired into. If he was brought from another jurisdiction by kidnapping, stratagem or illegal extradition he may still be tried if he is presently being held under process legally issued from a court of that jurisdiction." See also note, 165 A.L.R. 948 (1946). The problem is discussed, Plumb, "Illegal Enforcement of the Law," 24 CORN. L.Q. 337 (1939).

indifference to further rejection. Leader and follower, individualist and conventionalist will respond in varying degrees. Nevertheless the force exists, persistent and strong in its direction and control of conduct. It deals with both fundamentals and details. Its manifestations are ubiquitous. Given a start it builds automobile driver courtesy in one city, permits gross discourtesy in another. It explains the prevalence of petty theft in one area and its relative absence in another where economic conditions are apparently similar.[55] It shows itself often stronger than physical demands of the body. It can compel men to follow group-approved conduct in the face of dangers more frightening and more probable than anything threatened by law. Similarly, when group opinion clearly condemns some particular form of activity, individuals are strongly impelled to abstain from such activity.

I once asked England's director of public prosecutions why the London police did not carry pistols as ours do, if only as a matter of self-protection. He considered it amply sufficient explanation to say: "Our people would be greatly incensed if any criminal were to shoot at a policeman."[56] Yet when the British public was unsympathetic with the customs duties on rum and tobacco no vigor of enforcement could make them effective. It is agreed that laws of which the public approves are easier to enforce than those of which it does not. The truth is that this tendency of people to conform with the group belief diminishes the need for enforcement.

Behind this tendency to conform lies not only the compulsive fear of group disapproval for discovered nonconformity but also, in most men, a conduct control which is independent of either discovery or disapproval. To an undetermined but assumedly considerable extent all behavior is regulated by what the individual will think of himself. Whether this control is named conscience, or thought habit, or influence of the *super ego* upon the *id,* is unimportant here. The fact remains that men do tend to abstain

[55] "The second oldest boy was on probation for railroad larceny. The father does not consider this a crime like the daughter's staying out late at night. To steal from the manorial forest or from the railroad was not a socially disapproved form of conduct; but staying out late at night was frowned on in the peasant village." WOOD, HAMTRAMCK—THEN AND NOW 226 (1955).

[56] As the converse: When 17-year-old Frank Santana was arrested for deliberately shooting young William Blakenship to death in a New York city gang war he "grinned cockily," said he had got the gun because he was afraid of damaging his fists in street fights. As he was taken from the police station "three waiting girls, about 14 years old, waved and cheered 'I'll always love you, Tarzan,' one shrilled." Another pouted "everyone we know is at Warwick" reform school. TIME, May 16, 1955.

from conduct which they themselves consider wrong even when they have no fear of discovery. And as a rule this "conscience," this awareness of what one believes wrongful, feeds upon group belief and shapes itself largely from the expressed opinion of others.

Obviously, then, both individual conscience and the compulsive force of the tendency toward conformity are directly influenced by the strength of group ideals, by the definitions, assurance and vigor with which they condemn specific behavior. The manner in which those ideals are voiced by judicial utterance is therefore a major determinant of the country's crime burden.

Consider, for example, the case of Cosad, Shear and Crane.[57] They had been tried on a charge of rape. The jury convicted them of attempt to commit rape. New York's appellate judges, however, reversed that conviction on the ground not that the accused were innocent but that they had in fact committed rape. In an earlier case,[58] Rizzo, Dorio, Milo and Tomasello armed themselves with pistols and set out in an automobile to rob a paymaster named Rao. He had left the first job they went to; at the second he had not yet arrived. As they looked for him elsewhere, the police, suspicious of their movements, picked them up. In due course a jury convicted them of attempted robbery. But again New York's judges ordered the men set free. The court began its opinion with a compliment to the alertness of the police in preventing commission of a serious crime, but it set aside the conviction on the ground that Rizzo and his pals had not yet begun to attempt.

In neither case were those judges compelled to their decision by statute or precedent. Other courts have affirmed similar convictions in essentially similar circumstances.[59] Each decision was

[57] People v. Cosad, 253 App. Div. 104 (1937). See also, Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899); People v. Lardner, 300 Ill. 264, 133 N.E. 375 (1921).

I do not know whether these gross offenders went wholly unpunished or not. It is conventional law that conviction of an included offense constitutes acquittal of the offense charged, but New York cases appear to be in confusion on the matter.

[58] People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927). So also, People v. Miller, 2 Cal. (2d) 527, 42 P. (2d) 308 (1935); People v. Youngs, 122 Mich. 292, 81 N.W. 114 (1899); State v. Rains, 53 Mont. 424, 164 P. 540 (1917).

[59] To the effect that success does not preclude conviction for attempt, compare People v. Baxter, 245 Mich. 229 at 232, 222 N.W. 149 (1928): "The rule [that success precludes conviction of attempt] is not general and does not prevail in this jurisdiction. If an information admits of conviction of an attempt to commit a felony, an accused may be found guilty of the attempt though the evidence shows a completed offense. Such a verdict may be illogical, but the people can not complain, and the defendant must accept it even though less in measure than his just deserts; at least he can not be heard to say that he has suffered injury."

State v. Shepard, 7 Conn. 54 (1828), holds that proof of rape will sustain an indict-

a matter merely of judicial preference. In each case the defendants were men of demonstrated unfitness for social freedom who were nevertheless given their freedom by judicial fiat. The judges, completely free so far as any extraneous authority was concerned to do what they thought wise, preferred for some unexpressed reason to let those men go unpunished.

The effect of such judicial refusals to punish is far more serious than the mere escape of the particular offenders. They cannot fail to derogate the basic compulsion of individuals to abstain from what public opinion condemns. Not because the decisions diminish the human instinct for conformity with group ideals, but because they weaken the apparent strength of those ideals. Group notions of what is criminal conduct can be formulated by statute, or judicial legislation. But no such simple declaration can raise them to the position of group ideals with which conformity is expected. To that end nothing can so clearly crystallize abstract concepts of wrong, or so forcefully emphasize them, or so widely disseminate knowledge of their content as the solemn judicial imposition of punishment for their violation. *What makes law effective is not punishment, but the public declaration that punishment is deserved.* It operates as an unmistakable manifestation of that group opinion with which men instinctively tend to conform.[60]

ment to commit rape. State v. Harvey, 119 Ore. 512 at 515, 249 P. 172 (1926): "Where as in this state the statute expressly provides that one charged with the substantive offense may be convicted of an attempt to commit that offense thus making the attempt a necessary ingredient of the substantive offense, no sound reason can be advanced for acquitting one charged only with the lesser offense upon evidence tending to prove the substantive offense." New York does have such a statute: "Upon the trial of an indictment, the prisoner may be convicted of the crime charged, or . . . of an attempt to commit the crime." Penal Law, §610. "A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated. . . ." Penal Law, §260.

As to when an "attempt" begins, cf. Lovett v. State, 19 Tex. 174 (1857). There is no rule that there can be no "attempt" while opportunity for possible withdrawal still exists, otherwise there could be no criminal attempt until the bullet, as it were, had actually been sped upon its way. See also, Commonwealth v. Peaslee, 177 Mass. 267 at 272, 59 N.E. 55 (1901), there may be an attempt "although there is still a *locus penitentiae* in the need of a further exertion of the will to complete the crime." People v. Lombard, 131 Cal. App. 525, 21 P. (2d) 955 (1933), where there was an "attempt" although the actors lost their nerve and quit the undertaking. So also, State v. McCarthy, 115 Kan. 583, 224 P. 44 (1924), where the defendants could not find the objective of their attempt. People v. Stites, 75 Cal. 570, 17 P. 693 (1888); Rex. v. Barker, [1924] N.Z.L.R. 865.

[60] This is of course far from a novel proposition. In Bernard Shaw's aphorism, men are free to do whatever their government and public opinion permit.

"The stamping of an act the commission of which the State will prosecute with unrelenting severity, immediately arouses the feeling that the act is unsuitable, inadmissible, disreputable, contrary to duty. . . . Thus general prevention operates rather quietly,

But conversely, every judicially expressed opinion which minimizes the wickedness of an action, or which even by indirection palliates alleged wrongdoing, or which condones crime of any sort, weakens the apparent strength of group ideals and thereby diminishes the tendency of individuals to conform. What one man can flout without condemnation, another will flout. What judges palliate, other men will palliate.

I do not mean to suggest that an unnecessary judicial reversal of conviction for murder or rape will promptly produce an increase in murder or rape. The innate hostility of people to such action is too deep to be destroyed by casual judicial indifference. But indifference toward any wrongdoing fosters indifference toward all wrongdoing, and every judicial failure to condemn where condemnation is deserved encourages the whole fringe area wherein delinquency, vandalism and racketeering lead eventually to robbery and murder.[61]

The *Cosad* and *Rizzo* reversals were not unique. Rather, they represent many generations of apparent judicial indifference to effective law enforcement—a long practice of reversals predicated on narrowly sophistic reasoning. In the days when English criminal laws were irrationally harsh and the Bishop of Rochester could ask in Parliament the purely rhetorical question, "What have the masses to do with a law save to obey it?" there may have been an oblique sort of justification for the judicial indifference to effective enforcement. Sir James Stephen says of their technicalities:

slowly and penetratingly, making the consciousness of right sharper, intensifying the general feeling for right and wrong. . . ." ASCHAFFENBURG, CRIME AND ITS REPRESSION 259 (1913).

"Great part of the general detestation of crime which happily prevails amongst the decent part of the community in all civilized countries arises from the fact that the commission of offenses is associated in all such communities with the solemn and deliberate infliction of punishment whenever crime is proved. . . . The sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment. . . . The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and confirms and justifies that sentiment by inflicting upon criminals punishments which express it. I think that whatever effect the administration of criminal justice has in preventing the commission of crime is due as much to this circumstance as to any definite fear entertained by offenders of undergoing a specific punishment." SIR JAMES STEPHEN, 2 HISTORY OF CRIMINAL LAW OF ENGLAND 79 (1883).

61 "It is becoming increasingly embarrassing in our clinics to answer the child who says: 'Why worry about me cheating in school—read the newspapers and you'll see I'm just in training to be a successful adult.' This of course represents in part a rationalization, but only in part. It is most likely that our teen-agers are much more influenced in their behavior by the headlines than by the comics." Dr. Ralph D. Rabinovitch, U. of Mich. Neuropsychiatric Institute, in MICH. DAILY, May 22, 1955.

"The tendency was to make the administration of justice a solemn farce. Such scandals do not seem, however, to have been unpopular. Indeed I have some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law. . . . In short it is scarcely a parody to say, that from the earliest times to our own days, the law relating to indictments was much as if some small proportion of the prisoners convicted had been allowed to toss up for their liberty."[62]

The circumstances which created that justification—if it was a justification—long ago disappeared, but the reversal of deserved convictions has never ended. Only the judicial excuses have changed, through a variety of phases. Sophistry has been perennial. Semantics has sometimes given a pretense of reason. James Harris had his conviction of stealing a pair of boots reversed because he had actually stolen two for the right foot and the appellate judges could not consider them a "pair."[63] Richard Marsh got his reversed because he had been charged with stealing a "cow or animal of the cow kind" and the appellate judges said that the steer which he had stolen was male and could not be considered of the cow kind.[64]

Mere formalism also sufficed appellate judges as a pretext for reversal. Men guilty of rape found their convictions upset because a word, "the," had been omitted from the accusation's conventional conclusion, "against the peace and dignity of [the] State";[65] others profited because the name of the state had been omitted,[66] or abbreviated.[67] Illinois judges reversed one Goldberg's conviction on fifty charges because his name had been spelled Holdberg in one charge.[68] The variety of judicial excuses has been unending. "It may be shown by the most irrefragable proof that the defendant is guilty of the offense charged," said Wisconsin judges, but his conviction will be reversed if the rules of evidence have been violated;[69] even, said a Nebraska court, though the evidence

62 1 HISTORY OF THE CRIMINAL LAW OF ENGLAND 284 (1883).

63 State v. Harris, 3 Del. 559 (1841).

64 Marsh v. State, 3 Ala. App. 80, 57 S. 387 (1912).

65 State v. Campbell, 210 Mo. 202, 109 S.W. 706 (1907); State v. Warner, 220 Mo. 23, 119 S.W. 399 (1909). Repudiated, State v. Adkins, 284 Mo. 680, 225 S.W. 981 (1920).

66 Williams v. State, 27 Wis. 402 (1871).

67 Lemons v. State, 4 W.Va. 755, 6 Am. Rep. 293 (1870). All these decisions and an appalling array of similar absurdities are collected and discussed by Perkins, "Absurdities in Criminal Procedure," 11 IOWA L. REV. 297 (1926).

68 People v. Goldberg, 287 Ill. 238, 122 N.E. 530 (1919).

69 Schoser v. State, 36 Wis. 429 at 434 (1874).

rejected "would not have proved any fact of the least value in the case had it been properly admitted."[70]

Through public criticism and legislative pressure[71] these older judicial excuses for reversal have happily fallen more or less into disrepute and desuetude. The latest outstanding extravaganza I know is a Texas decision of 1945. Chesley Arthur Gragg had been convicted of drowning his wife, but appellate judges set the conviction aside because the charge had not informed Gragg "whether the deceased was drowned in water, coffee, tea, or what."[72]

The judicial excuses change, yes. Obvious sophistry has given place to Justice Frankfurter's "deepest feeling" against giving sanction to the "dirty business" of law enforcement,[73] and to the personal notions of judges as to how the police should behave. But judicial reversals still continue. The judicial damage to crime prevention still persists. To the simple citizen who hears of guilty men exempted from punishment by judicial decision it matters nothing what ulterior motive lies in the judicial mind. He knows only that the activities of a dope-peddler, a notorious numbers racketeer, a score of gun-toters, a counterfeiter, or a robber have not been considered wrongful enough by the judges to justify conviction. *Thus the harm is accomplished; the group*

70 Masters v. Marsh, 19 Neb. 458 at 467, 27 N.W. 438 (1886).

71 "Only an American court could announce so extraordinary a decision. In no other English speaking country would the people tolerate such a perversion of justice. . . . It clearly was not the force of authority but the instinct for technicality that brought about this decision. It is only an example of a tendency which manifests itself in a thousand ways. . . . We can only hope that the next fifteen years will show more progress in making procedure the servant of justice than the last fifteen have shown." E. R. Sunderland in 17 MICH. L. REV. 406 (1919).

"One of the most deplorable shortcomings of our present criminal law system is the frequency with which convictions are reversed and the penalty avoided because of some formal or technical error." 23 MICH. L. REV. 528 at 529 (1925).

Ohio Code (Page, 1939) § 13437-25: variances in name or description shall not be ground for acquittal unless found to be material to the merits.

72 Gragg v. State, 148 Tex. Crim. Rep. 267, 186 S.W. (2d) 243 (1945). The several opinions are in conflict with each other and the phrasing of some is confused so that it cannot be said that the court as a whole ordered the "cause dismissed" for this particular reason. But it did play a part and the conviction was reversed. See also Northern v. State, 150 Tex. Crim. 511, 203 S.W. (2d) 206 (1946). An elderly woman had picked up an 18-year-old hitchhiker who ordered her out in a secluded spot. The charge read, "Buster Northern . . . did then and there unlawfully, voluntarily and with malice aforethought, kill Fannie McHenry by then and there kicking and stamping the said Fannie McHenry." Reversed because the accusation did not say that the kicking and stamping were done with his feet.

In Tate v. State, 153 Tex. Crim. 571, 223 S.W. (2d) 634 (1949), conviction was reversed because the locality was alleged as "U.S. Highway No. 108 about two miles north of the city of Stephenville," and the evidence mentioned only "Highway No. 108" as the place stated.

73 On Lee v. United States, 343 U.S. 743, 72 S.Ct. 967 (1952).

*ideals are depreciated; the potentiality of abstention through conformity with group idealism is derogated; the crime burden is increased.*

Some types of decisions have become obsolescent, and their place is being filled by reversals and releases motivated by judicial wish to control the police. This alters only the judicial excuse and does not better the consequences. On the contrary this new judicial reason for reversal, while it has the same adverse effect as the old reasons on deterrence and innate abstention from crime, adds to that damage the judicial interference with enforcement efficiency.

Two implicit questions are thereby raised. Is there some social advantage compensatory of the harm done in this effort indirectly to control the police? If not, can the evil of this continued derogation of the public attitude toward crime be remedied?

As to possible public profit from the suppression of evidence and the release of known offenders no one can answer dogmatically; we have no real information. It is often asserted that no other practicable restraint of police over-zeal exists. It is true that direct action against the police by *guilty* persons who have been discovered by "unreasonable" methods will seldom be instituted because neither judge nor jury would award more than nominal damages. But innocent citizens whose privacy has been improperly invaded have recovered substantial judgments often enough to indicate that direct action is amply sufficient to prevent oppression.[74] It might well be noted in this connection that constitutions forbid unreasonable seizures of the person as well as unreasonable searches. Yet unlawful arrest is held satisfactorily in check by direct action; it has not become commonplace even though judges have not undertaken to control it by refusal to convict merely because the defendant was unlawfully arrested.[75]

[74] "If a police officer, by force, makes search of persons, or 'compels them to submit to it, he becomes a trespasser and for the wrong is civilly answerable; and he commits an indictable misdemeanor, the offense being aggravated because of his official relation and the abuse of its rightful powers.'" Ex parte City of Mobile, 251 Ala. 539 at 541, 38 S. (2d) 330 (1949).

Action in tort for damages from unlawful search of a house sustained: McClurg v. Brenton, 123 Iowa 368, 98 N.W. 881 (1904); McMahan's Admx. v. Draffen, 242 Ky. 785, 47 S.W. (2d) 716 (1932); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946) (action against agents of the F.B.I.). Search of a suitcase for liquor, damages for mental suffering approved: United States Fidelity and Guaranty Co. v. State, 121 Miss. 369, 83 S. 610 (1919). "Two suits brought by Hector Verburg, janitor in the spectacular Susanne Degnan murder case two years ago for $125,000 damages for false arrest against 17 Chicago policemen were settled for $20,000 yesterday." CHICAGO TRIBUNE, Feb. 21, 1948.

[75] "An illegal arrest does not prevent one from being validly indicted and tried."

But even if protection of the guilty by suppression of the evidence against them were truly essential to protection of the innocent from undue molestation, does the judicial method really conduce to that end? It might have had some such effect in England prior to establishment in 1829 of the present type of police. Before that it was common for constables and other enforcement officers greatly to enlarge their official incomes through sharing in forfeitures or fines and from rewards for convictions brought about through their efforts.[76] A judicial shutting off of those personal financial benefits because of improper activity might well have had a direct effect on police conduct. But that situation is altogether changed. It may distress and annoy the police to find that criminals they discover are freed by the judges, but it no longer touches their pocketbooks or themselves personally in any other way.

Oddly enough, the very judges who use the suppression method are not in agreement that it does improve police behavior. Justice Murphy has said:

> "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress on the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police."[77]

Finch v. Warden, 194 Md. 728 at 729, 71 A. (2d) 301 (1950); People v. Miller, 235 Mich. 340, 209 N.W. 81 (1926), 25 MICH. L. REV. 193 (1926).

[76] See the excellent article by Radzinowicz, "Trading in Police Services," 102 UNIV. PA. L. REV. 1 (1953).

[77] Wolf v. Colorado, 338 U.S. 25 at 44, 69 S.Ct. 1359 (1949), continuing, "if proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in-service courses provided the police in states which follow the federal rule."

This was quoted with approval by Douglas, J., dissenting, Irvine v. California, 347 U.S. 128 at 151, 74 S.Ct. 381 (1954).

But Justice Murphy, had he investigated both sides, might have found even more such training in states which do not follow the federal rule. Dean O. W. Wilson of the University of California School of Criminology writes me in reply to a question:

"Police training, almost without exception, includes instruction on the legal restrictions imposed on the police for the purpose of protecting individual rights. It can be said, therefore, that the extent of instruction in problems of search and seizure is very nearly in direct proportion to the extent of police training. In respect of police training, none of the states that follow the federal rule of exclusion equals two non-exclusion states: California, the most progressive of all in police training, and New York, an early leader in this field. With the exception of Michigan and Indiana, the states that follow the federal rule have not distinguished themselves in police training; most of them, in fact, are among the more backward states in this respect. In contrast, some non-exclusion

Five years later, however, Justice Jackson in a majority opinion notes,

> "That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasion of rights by the police. . . . It deprives society of its remedy against one law breaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. . . . It appears to the writer, in which view he is supported by the Chief Justice, that there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this gambler."[78]

states have superior training programs. Pennsylvania, Ohio, Kansas, and Minnesota are examples." [The foregoing reference to California as a non-exclusion state was written before that state's 1955 change.—Ed.]

[78] Irvine v. California, 347 U.S. 128 at 136 and 137, 74 S.Ct. 381 (1954). So also Justice Clark concurring (at 138): "We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit."

Compare also, Bourquin, J., in United States v. Rogers, (D.C. N.J. 1931) 53 F. (2d) 874 at 876, 877: "It [the Fourth Amendment] was designed to be a shield for the innocent; old John [Barleycorn] has converted it to a spear of aggression for the guilty. And the amount of judicial sanction his arrogance has received is one of the most shocking and alarming developments of the prohibition experiment. . . . If America is the most criminal country on earth, and it is, if the laws herein are most poorly enforced and justice most weakly administered, as they are, the aforesaid reprehensible treatment of officers of the law is a large contributing cause." Contrast Hutcheson, J., in In re Ginsburg, (2d Cir. 1945) 147 F. (2d) 749 at 750: "It may not be doubted . . . that the decisional gloss which constitutes the common law of the Constitution has created in the federal courts a climate of opinion favorable to the citizen, less favorable to his oppressors."

Exclusion is commented on favorably in Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920); Owens v. State, 133 Miss. 753, 98 S. 233 (1923); unfavorably in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); State v. Tonn, 195 Iowa 94, 191 N.W. 530 (1923). A similar contrariety of opinion by commentators has been verbose and sometimes acrimonious. E.g., 8 WIGMORE, EVIDENCE, 3d ed., §2183 (1940); Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1 (1930); Harno, "Evidence Obtained by Illegal Search and Seizure," 19 ILL. L. REV. 303 (1925); Waite, "Police Regulation by Rules of Evidence," 42 MICH. L. REV. 679 (1944); Grant, "Constitutional Basis of the Rule Forbidding Use of Illegally Seized Evidence," 15 So. CAL. L. REV. 60 (1941). See also Atkinson, "Admissibility of Evidence Obtained," 25 COL. L. REV. 11 (1925); Chafee, "Searches and Seizures," 35 HARV. L. REV. 694 (1922); 34 HARV. L. REV. 361 (1921); 36 YALE L.J. 536, 988 (1927); Wood, "Scope of the Constitutional Immunity Against Searches and Seizures," 34 W.VA. L.Q. 1 (1927); 11 CORN. L.Q. 250 (1926); 14 N.Y. UNIV. L.Q. REV. 79 (1937).

"The thesis that the suppression of unreasonably seized evidence discourages illegal police action has never been proved. The number of illegal search cases in jurisdictions which subscribe to the exclusionary rule seems to belie this hope." 35 MINN. L. REV. 457 at 468 (1951).

The actual profit to society from these reversals is quite as unprovable in fact as these contradictory judicial speculations would indicate. However, considerable evidence that their effect on police conduct is not desirable does exist. Inability to obtain deserved convictions through the courts has driven the police to methods less desirable than those for which the judges shut truth from the jury's ears. In Detroit, for illustration, the police raided a "blind pig" wherein they found liquor and a still. On the scanty facts which could have been presented to a magistrate it was highly improbable that a warrant would have been issued,[79] although the police were certain enough to risk what would have been serious consequences to themselves personally had they been wrong. Knowing that they could not get a conviction they sought to put the proprietor out of business by destroying his bar and equipment. The building was used also as a dwelling and because the police went so far as to smash furniture unrelated to the business part the affair came to public knowledge. The officers were disciplined, but at the same time the police commissioner admitted that he had himself given orders to raiders to wreck the bars and fixtures of such places. Mayor Murphy, later Justice Murphy, ordered a revocation of that order, but it was fairly common knowledge that the practice continued.[80]

On the other hand, so far as I have been able to discover, no evidence has ever been produced to the effect that the police in rejection and reversal states are better behaved or less prone to unreasonable action than are those in states which allow conviction of the guilty and rely on direct action to keep the police in order.

Although this judicial suppression of truth seems to produce no social benefit, its interference with effective law enforcement is widely apparent. I have already referred to the change in Michigan's constitution resulting from the judicial interference with attempts to check the carrying of concealed weapons.[81] In Maryland also, for similar reasons, the legislature went through illuminating changes of heart. The state courts had consistently held that otherwise admissible evidence would not be rejected merely

[79] See, e.g., Simmons v. United States, (8th Cir. 1927) 18 F. (2d) 85; United States v. Williams, (D.C. Pa. 1930) 43 F. (2d) 184; Wallace v. State, 199 Ind. 317, 157 N.E. 657 (1927).

[80] I saw it in operation on occasions myself. For a discussion of the particular incident, see DETROIT SATURDAY NIGHT, Nov. 22, 1930, which comments, "Whatever one may think of this method of enforcing laws, it was effective. To begin with the action was extremely costly to the pigger. . . . The raids themselves sufficed to put fear in the hearts of the wet proprietors and probably did more than anything else to increase the town's aridity."

[81] See note 39 supra.

because it had been obtained by unlawful search. In 1929, however, the legislature forbade the use of such evidence in prosecutions for misdemeanors, leaving it still usable in felony cases. But the effect on enforcement was such that in 1935 the statute was changed to make the evidence again usable against narcotics law violators. Still later, prosecutions for carrying concealed weapons were exempted from the prohibition. Finally, by 1953, the prohibition against use of the evidence had been repealed, first in respect of gambling cases and then of liquor law violations, in certain of the more populous counties.[82]

Assuming that the social harm of these judicial refusals of conviction is, as appears to be the fact, without discoverable compensatory advantage, how can the situation be remedied? Possibly by legislation if necessary. The people of Michigan became sufficiently incensed by judicial release of discovered gun-toters to insist by constitutional amendment that evidence of the truth be recognized by the courts in concealed weapon and narcotic drug cases.[83] If the change of rule could be wisely and properly made for that type of case it could be similarly made for all types. But, indeed, resort to the delay and effort of constitutional amendment would not be necessary. If the assertion of Justice Black is sound —and I have not seen it controverted—that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate,"[84] then action by Congress, or state legislatures would be enough to abrogate the exclusion without need for constitutional amendment. Such legislation would, of course, affirm the prohibition of unreasonable search or seizure. It might even strengthen existing remedies against the perpetrators of unreasonable search or seizure and broaden the scope of punitive action against them. It could in some such way counter the specious though sometimes plausible

[82] See Salsburg v. State, 201 Md. 212, 94 A. (2d) 280 (1952), affd. United States v. Maryland, 346 U.S. 545, 74 S.Ct. 280 (1954).

[83] Art. II, §10 (1936), firearms, blackjacks, etc., seized outside the curtilege of a dwelling house shall not be excluded as evidence in criminal cases. Narcotic drugs were covered by further amendment in 1952.

[84] Wolf v. Colorado, 338 U.S. 25 at 39, 69 S.Ct. 1359 (1949). Even Justices Murphy and Rutledge, dissenting from the proposition that the Fourteenth Amendment does not apply the Fourth to the states, speak of the "judicial exclusion of evidence" as one of three "alternatives" which should be followed because it is wiser and more practical than the others, not as something the Constitution itself compels. So, too, the California court in its 1955 change from admission of relevant evidence [See People v. Mayen, 188 Cal. 237, 205 P. 435 (1922)] to adoption of the federal rule of exclusion does not suggest that for a century California courts had been ignoring the dictates of their constitution. Instead they frankly recognize their action as a change in judicial policy. People v. Cahan, (Cal. 1955) 282 P. (2d) 905. See also notes 7 and 8 supra.

judicial argument that only by refusal to convict criminals can the public be protected against its own police. But whether or not it should go so far, *legislatures can by statutory enactment forbid their judges from concealing truth in the trial of cases.*[85]

But remedy lies also within the power of the judges themselves, without need for even legislative action. They some while ago gave up their penchant for sophistries of form and semantics when they saw it wise. They can, if they will, discard now their present motives for reversal. Justices Douglas, Black and Murphy once said of patent law rules which they did not like, "This Court was responsible for their creation. . . . This Court should take the responsibility for their removal."[86] In another case Justice Jackson remarked, "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."[87] Indeed, the Supreme Court has not infrequently reversed its earlier practices.[88]

By their self-assumed power to regulate and control the police, instead of leaving the duty to legislature and executive, by the limitations they seek to impose on crime-preventive efficiency, and, particularly, by their derogation of the public's attitude toward crime and criminals, judges have made themselves partly responsible for the country's burden of crime. They can free themselves of that responsibility and lessen the country's burden when they will, without need for legislation. Perhaps they will when the public appreciates the situation and makes evident its wishes.[89]

[85] A Maryland statute providing that evidence procured by illegal search should not be admissible *except* in prosecution for violation of the gambling laws in certain counties was held valid in Salsbury v. State, (Md. 1953) 94 A. (2d) 280. Of course where, as in Michigan, the court is by constitution given power to make rules of procedure there could be question of the scope of its power as to rules of evidence.

[86] Special Equipment Co. v. Coe, 324 U.S. 370 at 383 and 384, 65 S.Ct. 741 (1945).

[87] Massachusetts v. United States, 333 U.S. 611 at 639-640, 68 S.Ct. 747 (1948).

[88] E.g., Board of Education v. Barnette, 319 U.S. 624 at 642, 63 S.Ct. 1178 (1943), "The decision of this Court in Minersville School District v. Gobitis . . . [is] . . . overruled." United States v. Darby, 312 U.S. 100 at 116, 61 S.Ct. 451 (1941), "The conclusion is inescapable that Hammer v. Dagenhart (247 U.S. 251) was a departure from the principles which have prevailed in the interpretation of the Commerce Clause. . . . It should be and now is overruled." West Coast Hotel Co. v. Parrish, 300 U.S. 379 at 397, 400, 57 S.Ct. 578 (1937), "The decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. . . . There is an additional and compelling consideration which recent economic experience has brought into a strong light. . . . Our conclusion is that the case of *Adkins v. Children's Hospital* (261 U.S. 525) should be, and it is, overruled." For other instances see Helvering v. Griffiths, 318 U.S. 371 at 401, n. 52, 63 S.Ct. 636 (1943).

What the 1955 California court did in repudiating its old rule and adopting the rule of exclusion [People v. Cahan, (Cal. 1955) 282 P. (2d) 905] other courts have power to do in reverse, by repudiating their rule of exclusion.

[89] As Mr. Dooley once observed, "No matter whether th' Constitution follows th' flag or not, th' Supreme Court follows th' illection returns." DUNN, MR. DOOLEY'S OPINIONS 26.